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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 LARRY J. HASKELL and KATHRYN A.)
9 HASKELL,)
10 Plaintiffs,)
11 v.)
12 PNC BANK, N.A., et al,)
13 Defendants.)
14 _____)

3:11-cv-887-RCJ-VPC

ORDER

15 Currently before the Court is a motion to dismiss (#9) the complaint for failure to state
16 a claim filed by Defendants' PNC Bank, N.A. and Federal National Mortgage Association, Inc.
17 ("Fannie Mae") (collectively "Defendants"). For the following reasons, the motion to dismiss
18 (#9) is granted in part and denied in part.

19 **BACKGROUND¹**

20 Plaintiffs Larry and Kathryn Haskell (collectively "Plaintiffs") are the owners of real
21 property located at 3170 Zaragoza Drive, Sparks, Nevada (the "Property"). (Compl. (#1-1) at
22 2). On September 17, 2003 Plaintiffs executed a deed of trust (the "Deed of Trust") against
23 the Property to secure a \$197,600 loan. (Deed of Trust (#9-3) at 1-2). The Deed of Trust

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25 _____
26 ¹ Defendants have requested judicial notice to be taken of attached copies of relevant
27 publicly recorded documents. (See Req. for Judicial Notice (#9-1)). The Court takes judicial
28 notice of these public records. See *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*,
375 F.3d 861, 866 n.1 (9th Cir. 2004) (the court may take judicial notice of the records of state
agencies and other undisputed matters of public record under Fed. R. Evid. 201).

1 listed National City Mortgage Company (“National City”) as lender and Stewart Title Company
 2 as trustee. (*Id.*). National City later merged into PNC Bank, which thereby acquired the rights
 3 to the Deed of Trust by operation of law. (Mot. to Dismiss (#9) at 6).

4 On June 22, 2011, Cal-Western Reconveyance Corporation (“Cal-Western”), claiming
 5 to be the attorney-in-fact of PNC Bank, substituted itself as trustee of the Deed of Trust.
 6 (Substitution of Trustee (#9-4) at 5). No evidence that Cal-Western was given authority to act
 7 as attorney-in-fact for PNC Bank has been submitted to this Court.

8 At some point, Plaintiffs defaulted on the loan secured by the Deed of Trust and on
 9 June 27, 2011 Cal-Western recorded a notice of default. (Notice of Default (#9-4) at 6). A
 10 certificate was later issued by the State of Nevada Foreclosure Mediation Program allowing
 11 the foreclosure process to proceed, which was recorded on October 14, 2011. (Certificate (#9-
 12 4) at 8). On October 14, 2011, Cal-Western recorded a notice of trustee’s sale. (Notice of
 13 Trustee’s Sale (#9-4) at 9).

14 On November 10, 2011, Plaintiffs filed their complaint in the Second Judicial District
 15 Court of the State of Nevada against PNC Bank, Fannie Mae, and Cal-Western. (Compl. (#1-
 16 1) at 1). Fannie Mae is included in this action because allegedly PNC Bank indicated that
 17 Fannie Mae is the current owner of the promissory note and that Fannie Mae confirmed this,
 18 but it is unclear if Fannie Mae ever obtained ownership of the note and when this transfer may
 19 have taken place. (*Id.* at 4). The complaint lists three causes of action: (1) injunctive and
 20 declaratory relief based upon Defendants’ failure to conduct the foreclosure as dictated by
 21 NRS § 107.080; (2) breach of the implied duty of good faith and fair dealing; and (3) breach
 22 of contract. (*Id.* at 5-7).

23 The dispute was later removed to federal court on December 12, 2011. (Pet. for
 24 Removal (#1)). Defendants filed a motion to dismiss the complaint for failure to state a claim
 25 pursuant to Rule 12(b)(6) on February 17, 2012. (Mot. to Dismiss (#9)). Plaintiffs—who are
 26 proceeding pro se—failed to respond to the motion to dismiss.

27 **LEGAL STANDARD**

28 The purpose of a Rule 12(b)(6) motion to dismiss for failure to state a claim is to test

1 the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).
 2 “[T]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled
 3 to offer evidence to support the claims.” *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th
 4 Cir. 1997) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

5 To avoid a Rule 12(b)(6) dismissal, a complaint must plead “enough facts to state a
 6 claim to relief that is plausible on its face.” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017,
 7 1022 (9th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim
 8 is plausible on its face “when the plaintiff pleads factual content that allows the court to draw
 9 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v.
 10 Iqbal*, 556 U.S. 662, 678 (2009). Although detailed factual allegations are not required, the
 11 factual allegations “must be enough to raise a right to relief above the speculative level.”
 12 *Twombly*, 550 U.S. at 555. All well-pleaded factual allegations will be accepted as true and
 13 all reasonable inferences that may be drawn from the allegations must be construed in the
 14 light most favorable to the nonmoving party. *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir.
 15 2003).

16 If the court grants a motion to dismiss a complaint, it must then decide whether to grant
 17 leave to amend. The court should freely give leave to amend when there is no “undue delay,
 18 bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing
 19 party by virtue of allowance of the amendment, [or] futility of amendment.” *Foman v. Davis*,
 20 371 U.S. 178, 182 (1962); see also FED. R. CIV. P. 15(a). Generally, leave to amend is only
 21 denied when it is clear that the deficiencies of the complaint cannot be cured by amendment.
 22 *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

23 DISCUSSION

24 I. **Injunctive and Declaratory Relief Based on Violations of NRS § 107.080 and NRS 25 § 107.086 (Claim One)**

26 Plaintiffs’ claims in their first cause of action for injunctive and declaratory relief are not
 27 independent claims, but are dependent claims based on the assertion that the foreclosure
 28 process in this case was not in accordance with NRS § 107.080 and § 107.086. (Compl. (#1-

1 1) at 5-6); *In re Wal-Mart Wage & Hour Emp't Practices Litig.*, 490 F.Supp.2d 1091, 1130 (D.
 2 Nev. 2007) (clarifying that “[a]lthough denominated as a separate claim, count nine is not a
 3 separate cause of action but a request for injunctive relief” and “is not an independent ground
 4 for relief”); *Miller v. MERSCORP, Inc.*, 2011 WL 6097751, at *8 (D. Nev. 2011) (“Claims for
 5 injunctive relief [and] declaratory relief . . . are prayers for relief, not independent causes of
 6 action.”). NRS § 107.080 and NRS § 107.086 set out certain procedures that must be
 7 followed before a trustee may execute the power of sale, and if these procedures are not
 8 substantially complied with, the sale may be declared void. Nev. Rev. Stat. § 107.080(5)(a).
 9 In order to foreclose on the borrower, the beneficiary, successor in interest of the beneficiary
 10 or the trustee must first execute and cause to be recorded a notice of default. *Id.* §
 11 107.080(2)(c). It is a statutory defect for an entity that is not yet the beneficiary, trustee, or an
 12 agent of one of these entities to record the notice of default. *Chandler v. Indymac Bank*,
 13 F.S.B., 2011 WL 1792772, at *2 (D. Nev. 2011). The notice of default must then be mailed
 14 to the borrower along with a form upon which the borrower may indicate an election to enter
 15 into mediation under the Nevada Foreclosure Mediation Program. Nev. Rev. Stat. §
 16 107.086(2)(a)(3). The foreclosure then may not proceed until a certification has been
 17 recorded from the Mediation Administrator providing that mediation is either not required or
 18 has been completed. *Id.* § 107.086(2)(c).

19 The complaint first alleges that the foreclosure process failed to comply with NRS §
 20 107.086(2)(a)(3) because Plaintiffs did not receive a form upon which they could opt into
 21 Nevada’s Foreclosure Mediation Program. (Compl. (#1-1) at 3). Defendants seek to introduce
 22 declarations and affidavits along with evidence that the required forms were sent via certified
 23 mail in support of their argument that the election for mediation form was sent to Plaintiffs.
 24 See (Thomas Decl. (#9-2) at 2; McMullen Aff. (#9-5); Certified Mail (#9-9)).

25 “If, on a motion under Rule 12(b)(6) . . . , matters outside the pleadings are presented
 26 to and not excluded by the court, the motion must be treated as one for summary judgment
 27 under Rule 56.” Fed. R. Civ. P. 12(d). A court must grant summary judgment when “the
 28 movant shows that there is no genuine dispute as to any material fact and the movant is

1 entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The moving party bears the
2 initial burden of showing the absence of a genuine issue of material fact. See *Celotex Corp.*
3 *v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets its initial burden, the burden
4 will then shift to the opposing party to establish that a genuine issue of material fact exists.
5 See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The
6 opposition must go beyond the allegations and assertions of the pleadings and set forth
7 specific fact by providing the court with competent evidence that establishes a genuine issue
8 for trial. FED. R. CIV. P. 56(e); *Celotex Corp.*, 477 U.S. at 324. If the moving party fails to
9 satisfy its initial burden, the court must deny the motion for summary judgment and need not
10 consider the nonmoving party's evidence. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144,
11 159-60 (1970).

12 Generally, the mailing of a document gives rise to a presumption of its receipt. *Hankins*
13 *v. Adm'r of Veterans Affairs*, 555 P.2d 483, 484 (Nev. 1976). Defendants here have presented
14 declarations, affidavits, and other evidence that the notice of election was sent via certified
15 mail. (Thomas Decl. (#9-2) at 2; McMullen Aff. (#9-5); Certified Mail (#9-9)). Plaintiffs have
16 failed to make any showing that would rebut this evidence. Defendants are therefore entitled
17 to summary judgment on the claim that the foreclosure process failed to comply with NRS §
18 107.086.

19 Defendants however are not entitled to summary judgment on the claim that they
20 violated NRS § 107.080 because it is not clear that Cal-Western has been properly substituted
21 as trustee of the Deed of Trust. (Compl. (#1-1) at 5). Cal-Western substituted itself as trustee
22 of the Deed of Trust on June 22, 2011. (Substitution of Trustee (#9-4) at 5). Cal-Western
23 claimed it was acting as attorney-in-fact for PNC Bank, but Defendants have failed to present
24 any evidence that Cal-Western had authority to act on behalf of PNC Bank in executing the
25 substitution of trustee. A genuine issue of material fact therefore exists as to whether Cal-
26 Western had authority to execute the substitution of trustee. Accordingly, Defendants are not
27 entitled to summary judgment on the claim for violation of NRS § 107.080 or the dependent
28 injunctive and declaratory relief claims that are based on Plaintiffs' NRS § 107.080 claim.

1 **II. Breach of the Implied Duty of Good Faith and Fair Dealing (Claim Two)**

2 Plaintiffs next allege that Defendants breached the implied duty of good faith and fair
 3 dealing. (Compl. (#1-1) at 6-7). Nevada law holds that “[e]very contract imposes upon each
 4 party a duty of good faith and fair dealing in its performance and its enforcement.” *A.C. Shaw*
 5 *Constr., Inc. v. Washoe Cnty.*, 784 P.2d 9, 9 (Nev. 1989) (quoting RESTATEMENT (SECOND) OF
 6 CONTRACTS § 205). “[T]he implied covenant ‘exists merely to prevent one contracting party
 7 from unfairly frustrating the other party’s right to receive the benefits of the agreement actually
 8 made.’” *Guthrie v. Argent Mortg. Co., LLC*, 2011 WL 6140660, at * 3 (D. Nev. 2011) (citing
 9 *Guz v. Bechtel Nat., Inc.*, 24 Cal.4th 317, 349 (2000)). To succeed on a claim for breach of
 10 the covenant of good faith and fair dealing, a plaintiff must show: (1) the plaintiff and defendant
 11 were parties to an agreement; (2) the defendant owed a duty of good faith to the plaintiff; (3)
 12 the defendant breached that duty by performing in a manner that was unfaithful to the purpose
 13 of the contract; and (4) the plaintiff’s justified expectations were denied. *Perry v. Jordan*, 900
 14 P.2d 335, 338 (Nev. 1995).

15 The complaint here merely states that Defendants “breached the implied duty of good
 16 faith and fair dealing attendant to the subject mortgage contract in a tortuous manner.”
 17 (Compl. (#1-1) at7). Plaintiffs have provided no further allegations describing the manner in
 18 which they believe this duty was breach nor do they provide any support in their complaint for
 19 this allegation. Plaintiffs here received the funds as agreed in the loan and have not alleged
 20 how Defendants contravened the spirit of the contract. Accordingly, Plaintiffs have failed to
 21 state a claim for breach of the implied duty of good faith and fair dealing.

22 **III. Breach of Contract (Claim Three)**

23 Plaintiffs’ final claim alleges that Defendants breached the Deed of Trust by foreclosing
 24 on Plaintiffs’ home without giving them the option to take advantage of Nevada’s Foreclosure
 25 Mediation Program. (Compl. (#1-1) at 7). “Nevada law requires the plaintiff in a breach of
 26 contract action to show (1) the existence of a valid contract, (2) a breach by the defendant,
 27 and (3) damage as a result of the breach.” *Saini v. Int’l Game Tech.*, 434 F.Supp.2d 913, 919-
 28 20 (D. Nev. 2006) (citing *Richardson v. Jones*, 1 Nev. 405, 405 (1865)). The Deed of Trust

1 however nowhere requires that a mediation election form be provided to Plaintiffs. (Deed of
2 Trust (#9-3)). The requirement that foreclosure mediation be offered is solely statutory. See
3 NEV. REV. STAT. § 107.086(2)(a)(3). As the Deed of Trust did not obligate Defendants to offer
4 foreclosure mediation, this claim is hereby dismissed.²

5 CONCLUSION

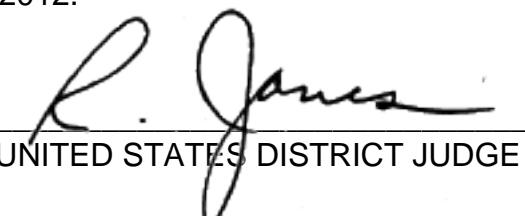
6 For the foregoing reasons, IT IS ORDERED that the Court grants in part and denies in
7 part Defendants' motion to dismiss.

8 IT IS FURTHER ORDERED that Defendants' motion to dismiss Plaintiffs first claim for
9 injunctive and declaratory relief based on violations of NRS § 107.080 and § 107.086 is
10 converted into a motion for summary judgment and that Defendants are awarded summary
11 judgment on Plaintiffs' claim for violations of NRS § 107.086, but Defendants' are denied
12 summary judgment on the claims for violations of NRS § 107.080 along with the dependent
13 claims of injunctive and declaratory relief.

14 IT IS FURTHER ORDERED that Defendants' motion to dismiss is granted with regard
15 to Plaintiffs' claim for breach of the implied duty of fair dealing and that this claim is dismissed
16 with leave to amend.

17 IT IS FURTHER ORDERED that Defendants' motion to dismiss is granted with regard
18 to Plaintiffs' claim for breach of contract and that this claim is dismissed without leave to
19 amend.

20 DATED this 3rd day of August, 2012.

21 
22

UNITED STATES DISTRICT JUDGE
23

24 ² Even if the Deed of Trust did require the foreclosure mediation forms to be provided,
25 as noted above, Defendants have presented evidence that these forms were in fact provided
26 to Plaintiffs. (Thomas Decl. (#9-2) at 2; McMullen Aff. (#9-5); Certified Mail (#9-9)). As
27 Plaintiffs have failed to rebut this evidence, summary judgment could be granted on this claim
28 as well.